


1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY SMITH
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

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8 Attorneys for Plaintiff
9 DONATUS MCCOY

FILED
San Francisco County Superior Court

SEP 21 2023

CLERK OF THE COURT
BY: 
Deputy Clerk

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO

13 DONATUS MCCOY,

14 Plaintiff,

15 v.

16 VIDA SHOES INTERNATIONAL, INC.,

17 Defendant.

Case No. CGC-23-604148

[PROPOSED] CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: September 21, 2023

Hearing Time: 9:30 AM

Complaint Filed: January 20, 2023

18 **1. INTRODUCTION**

19 1.1 **The Parties.** This Consent Judgment is entered into by and between Donatus McCoy
20 acting on behalf of the public interest ("McCoy") and Vida Shoes International, Inc. ("Vida Shoes"
21 or "Defendant") with McCoy and Defendant collectively referred to as the "Parties" and each of
22 them as a "Party." McCoy is an individual residing in California that seeks to promote awareness of
23 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
24 substances contained in consumer products. Vida Shoes is alleged to be a person in the course of
25 doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

26 1.2 **Allegations and Representations.** McCoy alleges that Defendant manufactures,
27 distributes and/or sells shoes with heels that contain and expose individuals to bisphenol A (BPA)
28 without providing a clear and reasonable exposure warning pursuant to Proposition 65. BPA is listed
under Proposition 65 as a chemical known to the State of California to cause birth defects or other

CONSENT JUDGMENT

1 reproductive harm.

2 1.3 **Notice of Violation/Complaint.** On or about January 27, 2022, McCoy served Vida
3 Shoes, Burlington Stores, Inc., Burlington Coat Factory Holdings, LLC (collectively, "Burlington"),
4 Global Brand Holdings, LLC ("Global Brand"), and various public enforcement agencies with
5 documents entitled "60-Day Notice of Violation" pursuant to Health & Safety Code § 25249.7(d)
6 (the "Notice"), alleging that Defendant violated Proposition 65 for failing to warn consumers and
7 customers that wearing women's shoes manufactured, distributed or sold by Defendant which
8 contain heels including, but not limited to Zoey XOXO, Style # XO221700 heels, expose users in
9 California to BPA. No public enforcer has brought and is diligently prosecuting the claims alleged in
10 the Notice. On January 20, 2023, McCoy filed a complaint (the "Complaint") in the matter.

11 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
12 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
13 venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve, enter,
14 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
15 claims which were or could have been raised in the Complaint based on the facts alleged therein
16 and/or in the Notice.

17 1.5 Defendant denies the material allegations contained in McCoy's Notice and
18 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
19 shall be construed as an admission by Defendant of any material allegation of the Complaint (each
20 and every allegation of which Defendant denies), any fact, conclusion of law, issue of law or
21 violation of law, including without limitation, any admission concerning any violation of Proposition
22 65 or any other statutory, regulatory, common law, or equitable doctrine, or the meaning of the terms
23 "knowingly and intentionally expose" or "clear and reasonable warning" as used in Health and
24 Safety Code § 25249.6. Nothing in this Consent Judgment, nor compliance with its terms, shall
25 constitute or be construed as an admission by Defendant of any fact, conclusion of law, issue of law,
26 or violation of law, or of fault, wrongdoing, or liability by any Defendant, its officers, directors,
27 employees, or parent, subsidiary, or affiliated corporations, or be offered or admitted as evidence in
28 any administrative or judicial proceeding or litigation in any court, agency, or forum. Nothing in this

1 Consent Judgment shall be construed as an admission by Defendant of any fact, finding, issue of
2 law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed
3 as an admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such
4 being specifically denied by Defendant. However, this section shall not diminish or otherwise affect
5 the obligations, responsibilities, and duties of Defendant under this Consent Judgment.

6 **2. DEFINITIONS**

7 2.1 **Covered Products.** The term "Covered Products" means the heels of women's shoes
8 including, but not limited to Zoey XOXO, Style # XO221700 heels that are manufactured,
9 distributed and/or offered for sale in California which contain BPA.

10 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
11 entered as a Judgment of the Court.

12 **3. INJUNCTIVE RELIEF: REFORMULATION/WARNINGS**

13 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is
14 signed by both Parties, and continuing thereafter, Covered Products that Vida Shoes directly
15 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
16 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
17 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
18 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in §
19 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
20 Product.

21 3.2 **Reformulation Standard.** "Reformulated Products" shall mean any Covered
22 Products subject to this Settlement Agreement that achieve a wipe result equal to, or less than, 3
23 micrograms of BPA.

24 3.2.1 **Wipe Test Protocol.** The "Wipe Test Protocol" for determining if a Covered
25 Product qualifies as a Reformulated Product is as follows:

26 3.2.1(a) Accessible sample surface of Covered Product is rubbed using
27 a Ghost wipe wetted with HPLC grade water heated to 98 °F in which the heel portion of the
28 shoe is wiped sixty (60) times along longitudinal, latitudinal, and diagonal orientation.

1 3.2.1(b) The Ghost wipe sample is then extracted with methanol on
2 wrist shaker for one (1) hour, followed by analysis with High-Performance Liquid
3 Chromatography – Mass Selective Detector (HPLC-MSD).

4 3.2.1(c) Reformulated Products are Covered Products achieving a wipe
5 result equal to, or less than, 3 micrograms of BPA per wipe sample.

6 **3.3 Clear and Reasonable Warning.** As of the date this Consent Judgment is signed by
7 both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in this
8 §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers, imports,
9 distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall be no
10 obligation for Defendant to provide a warning for Covered Products that enter the stream of
11 commerce (*i.e.* product that has been manufactured, has shipped, or has sold) prior to the Effective
12 Date. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§
13 3.3(a) or (b), respectively:

14 (a) **Warning.** The “Warning” shall consist of the statement:

15 **⚠ WARNING:** This product can expose you to chemicals including bisphenol A
16 (BPA), which is known to the State of California to cause birth defects or other
17 reproductive harm. For more information go to www.P65Warnings.ca.gov.

18 (b) **Alternative Warning:** Vida Shoes may, but is not required to, use the alternative
19 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

20 **⚠ WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

21 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
22 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
23 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
24 triangle with a black outline, except that if the sign or label for the Covered Product does not use the
25 color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than
26 the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed to or
27 printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic
28 device or automatic process, providing that the warning is displayed with such conspicuousness, as

1 compared with other words, statements, or designs as to render it likely to be read and understood by
2 an ordinary individual under customary conditions of purchase or use. The **Warning** or **Alternative**
3 **Warning** may be contained in the same section of the packaging, labeling, or instruction booklet
4 that states other safety warnings, if any, concerning the use of the Covered Product and shall be at
5 least the same size as those other safety warnings.

6 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product's
7 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
8 Defendant offers Covered Products for sale to consumers in California. The requirements of this
9 Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink
10 using the word "**WARNING**," appears on the product display page, or by otherwise prominently
11 displaying the warning to the purchaser prior to completing the purchase. To comply with this
12 Section, Defendant shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it
13 has the ability to do so, on the websites of third-party internet sellers that Defendant has written
14 agreements with; and (b) if Defendant does not have the ability to post the **Warning** or **Alternative**
15 **Warning** on the websites of third-party internet sellers that it has written agreements with,
16 Defendant shall provide such third-party internet sellers with written notice in accordance with Title
17 27, California Code of Regulations, Section 25600.2. Third-party internet sellers of the Covered
18 Product that have been provided with written notice in accordance with Title 27, California Code of
19 Regulations, Section 25600.2 are not released, prospectively, following the Effective Date, in
20 Section 5 of this Agreement if they fail to meet the warning requirements of this Section.

21 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
22 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
23 Judgment or by complying with any safe harbor warning content and method requirements adopted
24 by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA")
25 applicable to the Covered Product and the exposures at issue after the Effective Date.

26 **4. MONETARY TERMS**

27 4.1 **Civil Penalty.** Vida Shoes shall pay \$3,000.00 as a Civil Penalty pursuant to Health
28 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &

1 Safety Code §§ 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the
2 remaining 25% of the Civil Penalty remitted to McCoy, as provided by California Health & Safety
3 Code § 25249.12(d).

4 4.1.1 Within ten (10) days of the Effective Date, Vida Shoes shall issue two
5 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00; and to
6 (b) "Donatus McCoy" in the amount of \$750.00. Payment owed to McCoy pursuant to this Section
7 shall be delivered to the following payment address:

8 Evan J. Smith, Esquire
9 Brodsky & Smith
10 Two Bala Plaza, Suite 805
11 Bala Cynwyd, PA 19004

12 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered
13 directly to OEHHA (Memo Line "Prop 65 Penalties") at one of the following address(es):

14 For United States Postal Service Delivery:

15 Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 P.O. Box 4010
19 Sacramento, CA 95812-4010
20 For Non-United States Postal Service Delivery:

21 Mike Gyurics
22 Fiscal Operations Branch Chief
23 Office of Environmental Health Hazard Assessment
24 1001 I Street
25 Sacramento, CA 95814

26 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith at the address
27 set forth above as proof of payment to OEHHA.

28 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, and upon provision of a
completed W-9 and payment instructions by McCoy's attorneys, Defendant shall pay \$29,000.00 to
Brodsky Smith as complete reimbursement for McCoy's attorneys' fees and costs incurred as a
result of investigating, bringing this matter to Defendant's attention, litigating and negotiating and
obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure
§ 1021.5.

1 4.3 **Enforcement.** The Parties may, by motion or application for an order to show cause
2 before the Superior Court of San Francisco County, enforce the terms and conditions contained in
3 this Consent Judgment. Prior to bringing any motion or application to enforce the requirements of
4 Section, Plaintiff shall provide a Settling Defendant with a Notice of Violation and a copy of any test
5 results which purportedly support the Notice of Violation. The Parties shall then meet and confer
6 regarding the basis for the anticipated motion or application in an attempt to resolve it informally,
7 including providing the Settling Defendant(s) with a reasonable opportunity of at least thirty (30)
8 days to cure any alleged violation. Should such attempts at informal resolution fail, Plaintiff may file
9 an enforcement motion or application. This Consent Judgment may only be enforced by the Parties.

10 **5. RELEASE OF ALL CLAIMS**

11 5.1 This Consent Judgment is a full, final, and binding resolution between McCoy acting
12 on his own behalf, and on behalf of the public interest, and Defendant, and its past and present
13 parents, shareholders, members, directors, officers, managers, employees, representatives, agents,
14 insurers, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates,
15 and their predecessors, successors and assigns (“Defendant Releasees”), and all entities from whom
16 they obtain, to whom they directly or indirectly distribute to, or sell Covered Products, or the
17 materials contained therein, including but not limited to, manufacturers, suppliers, distributors,
18 wholesalers, customers, licensors, licensees, retailers (including but not limited to, Burlington,
19 Global, BCBG IP Holdings LP, Marquee Brands IG GP LLC, Marquee Brands, LLC, The TJX
20 Companies, Inc.) and each of their parents, subsidiaries, and affiliated entities), franchisees, and
21 cooperative members (“Downstream Releasees”), of all claims for violations of Proposition 65 based
22 on exposure to BPA from use of the Covered Products as set forth in the Notice, with respect to any
23 Covered Products manufactured, distributed, or sold by Defendant prior to the Effective Date. It is
24 the Parties’ intention that this Consent Judgment shall have preclusive effect such that no other
25 actions by private enforcers, whether purporting to act in his, her, or its interests or the public
26 interest shall be permitted to pursue and/or take any action with respect to any violation of
27 Proposition 65 based on exposure to BPA that was alleged in the Complaint, or that could have been
28 brought pursuant to the Notice against Defendant, Defendant Releasees, and/or the Downstream

1 Releasees of the Covered Products (“Proposition 65 Claims”).

2 5.2 In addition to the foregoing, McCoy, on behalf of himself, his past and current agents,
3 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,
4 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
5 and releases Defendant, Defendant Releasees, and Downstream Releasees from any and all manner
6 of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
7 promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of any nature
8 whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with
9 respect to any alleged violations of Proposition 65 related to or arising from Covered Products
10 manufactured, distributed, or sold by Vida Shoes, Defendant Releasees or Downstream Releasees.
11 With respect to the foregoing waivers and releases in this paragraph, McCoy hereby specifically
12 waives any and all rights and benefits which he now has, or in the future may have, conferred by
13 virtue of the provisions of § 1542 of the California Civil Code, which provides as follows:

14
15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
16 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
17 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
18 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
19 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR
20 OR RELEASED PARTY.

21 McCoy understands and acknowledges that the significance and consequence of this waiver
22 of California Civil Code section 1542 is that even if he suffers future damages arising out of or
23 resulting from, or related directly or indirectly to, in whole or in part, Proposition 65 Claims arising
24 from any violation of Proposition 65 or any other statutory or common law regarding the failure to
25 warn about exposure to BPA from the Covered Products, including but not limited to any exposure
26 to, or failure to warn with respect to exposure to BPA from the Covered Products, McCoy will not
27 be able to make any claim for those damages against Defendant, Defendant Releasees, and
28 Downstream Releasees. Furthermore, McCoy acknowledges that he intends these consequences for
any such Proposition 65 Claims arising from any violation of Proposition 65 or any other statutory or
common law regarding the failure to warn about exposure to BPA from Covered Products as may

1 exist as of the date of this release but which she does not know exist, and which, if known, would
2 materially affect his decision to enter into this Consent Judgment, regardless of whether his lack of
3 knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

4 5.3 Defendant waives any and all claims against McCoy, his attorneys and other
5 representatives, for any and all actions taken, or statements made (or those that could have been
6 taken or made) by McCoy and his attorneys and other representatives, whether in the course of
7 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
8 and/or with respect to exposure to BPA from Covered Products.

9 **6. INTEGRATION**

10 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and all
11 prior negotiations and understandings related hereto shall be deemed to have been merged within it.
12 No representations or terms of agreement other than those contained herein exist or have been made
13 by any Party with respect to the other Party or the subject matter hereof.

14 **7. GOVERNING LAW**

15 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
16 California and apply within the State of California. If Proposition 65 is repealed or is otherwise
17 rendered inapplicable by reason of law generally, or as to Covered Products, then Defendant shall
18 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
19 Covered Products are so affected.

20 **8. NOTICES**

21 8.1 Unless specified herein, all correspondence and notices required to be provided
22 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
23 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by
24 the other party at the following addresses:

25 For Defendant:

26 John J. Allen Esq.
27 Allen Matkins Leck Gamble Mallory & Natsis LLP
28 865 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-2543

1 And

2 For McCoy:

3 Evan Smith
4 Brodsky Smith
5 9595 Wilshire Blvd., Ste. 900
6 Beverly Hills, CA 90212

7 Any party, from time to time, may specify in writing to the other party a change of address to
8 which all notices and other communications shall be sent.

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

10 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
11 which shall be deemed an original, and all of which, when taken together, shall constitute one and
12 the same document.

13 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**

14 **APPROVAL**

15 10.1 McCoy agrees to comply with the requirements set forth in California Health &
16 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
17 Defendant agrees it shall support approval of such Motion.

18 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
19 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
20 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
21 days, the case shall proceed on its normal course. If the Consent Judgment is approved, McCoy shall
22 file a dismissal of this entire action with prejudice within three (3) business days of when the Court
23 approves the Consent Judgment.

24 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
25 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
26 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
27 its normal course on the trial court's calendar.

28 **11. MODIFICATION**

11.1 This Consent Judgment may be modified only by further stipulation of the Parties

1 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

2 11.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
3 meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

4 **12. ATTORNEY'S FEES**

5 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
6 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs,
7 provided that any Party initiating legal action against another Party with respect to the Covered
8 Products or the contents/terms of this agreement must provide 60-days' notice prior to initiating such
9 action. During such 60-day period, the Party that receives such notice shall be permitted to cure any
10 alleged defect or lack of compliance, and the Parties agree that any such cure, if it resolves the
11 alleged defect or lack of compliance, shall serve as the full remedy for any prior alleged defects or
12 lack of compliance.

13 **13. RETENTION OF JURISDICTION**

14 13.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent
15 Judgment.

16 **14. AUTHORIZATION**

17 The undersigned are authorized to execute this Consent Judgment on behalf of their
18 respective Parties and have read, understood, and agree to all of the terms and conditions of this
19 document and certify that he or she is fully authorized by the Party he or she represents to execute
20 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
21 explicitly provided herein each Party is to bear its own fees and costs.

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AGREED TO:

AGREED TO:

Date: 7/19-23

Date: _____

By: *Donatus McCoy*
DONATUS MCCOY

By: _____
VIDA SHOES INTERNATIONAL, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: _____

Date: AUGUST 1, 2023

By: _____
DONATUS MCCOY

By: _____
VIDA SHOES INTERNATIONAL, INC.
ARTHUR LEVIN

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 9/21/23

Ul
Judge of Superior Court

RICHARD ULMER